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No. —

Supreme Court, U.S.
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In The Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE
LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,
Petitioner,

v.

LELIA MARIE TASSIN, WIFE OF/AND
IRVING C. TASSIN, JR., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA
FOURTH CIRCUIT COURT OF APPEAL

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

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CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 99-7665 DIVISION "B"
c/w all cases SECTION 15

LEILA MARIE TASSIN, WIFE OF/AND IRVING C. TASSIN, JR.
VERSUS
FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVICH, CASINO MAGIC AND THE INSURERS OF FRANK BEDELL, CUSTOM BUS CHARTERS, INC., AND CASINO MAGIC

JUDGMENT

The motion of the defendant, the State of Louisiana, through the Department of Transportation and Development, for a new trial pursuant to La.C.C.P. art. 1971 and/or alternatively to amend judgment pursuant to La. C. C. P. art. 1951 came for hearing before this Honorable Court on Tuesday, March 27, 2007.

After considering the memorandum of counsel, oral argument, and review of the applicable law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed by DOTD is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Amend Judgment is GRANTED;

THUS, the Court renders the following Partial Final Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that after a bifurcated trial solely addressing the issue of liability, pursuant to LSA-

C.C.P. art. 1915(5) and based on the evidence presented at trial on August 22, 23, 24, 25, September 14, and 15, Octob er 9, 10, 11, 23, 24, November 13 and 14, 2006 Judgment is entered in favor of plaintiffs in the above-captioned matter and against DOTD as to liability for the incident of May 9, 1999, which accident forms the subject matter of the above-referenced consolidated cases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that liability is apportioned as follows: 50% fault is allocated to DOTD, 50% fault is allocated to Frank Bedell, operator of the bus involved in the May 9, 1999 incident.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DOTD is hereby ordered to pay 50% of costs of this proceeding, to be determined at a hearing to set costs on May 23, 2007 at 10:00 a.m. and after which an amended judgment shall be issued specifying the dollar amount of same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State of Louisiana, through the Department of Transportation and Development shall pay judicial interest on any damages verdicts which shall be rendered in an amount consistent with LSA-R.S. 13:5112(c).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to LSA-C.C.art. 1915(C), should an appeal be taken from this judgment, this trial court shall retain jurisdiction to adjudicate the remaining issues in this case.

SO ORDERED, IN NEW ORLEANS, LOUISIANA THIS 27th DAY OF APRIL, 2007.

S/ Rosemary Ledet
ROSEMARY LEDET
JUDGE

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO.99-7665 DIVISION "B"
c/w SECTION 15

99-7712	99-7764	99-7816	99-7936
99-8081	99-8086	99-8087	99-8097
99-8132	99-8133	99-8226	99-8403
99-8404	99-8405	99-8406	99-8407
99-8470	99-8471	99-8562	99-8842
99- 9342	99-9508	99-10078	99-10369
99-10417	99-11628	99-11911	99-13451
99-16031	99-17756	2000-7026	2000-7078
2000-5351			

LEILA MARIE TASSIN, WIFE OF/AND
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FRANK BEDELL, CUSTOM BUS
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PRESIDENT,DONNA BeGOVICH,CASINO
MAGIC AND THE INSURERS OF FRANK
BEDELLCUSTOM BUS CHARTERS, INC. AND
CASINO MAGIC

JUDGMENT

The above consolidated matters came for trial on the merits on August 22, 23, 24, 25, September 14, 15, October 9, 10, 11, 23, 24, November 13 and 14, 2006.

Considering the stipulations, testimony,

exhibits, and for reasons assigned herein,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiffs in the above-consolidated cases against the State of Louisiana, Department of Transportation and Development as to liability for the accident of May 9, 1999.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that liability is apportioned equally, fifty percent (50%) each, between the bus operator Frank Bedell and defendant, State of Louisiana, Department of Transportation and Development.

FURTHER, defendant, State of Louisiana through the Department of Transportation and Development, shall pay fifty percent (50%) of costs of the proceedings on liability.

IT IS FURTHER ORDERED that counsel for all parties appear on Tuesday, March 27, 2007, at 10:00 a.m. for the selection of a trial date and scheduling order on the issue of damages.

Judgment Rendered and Signed, February 6, 2007.

S/ Rosemary Ledet
ROSEMARY LEDET
JUDGE

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 99-7665 DIVISION "B"
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Reasons for Judgment

This case arises from a one vehicle accident on Mother's Day, May 9, 1999 involving a tour bus owned by Custom Bus Charters, Inc. ("Custom Bus") and operated by its employee, Frank Bedell. The bus left LaPlace, Louisiana

with forty three passengers and Mr. Bedell destined for Casino Magic in Bay St. Louis, Mississippi. As the bus headed to the Mississippi Gulf Coast, it traveled along the I-610 in New Orleans, Louisiana. The highway at the location of the accident approaches an overpass. Below was a golf cart path connecting the clubhouse to the golf course in City Park. There was 33 feet of guardrail along the right shoulder of the highway.

As the bus approached the overpass, it left the highway off the right shoulder through the guardrail. It then traveled down a grassy vertical slope, became airborne and landed on a far side embankment where it came to its final rest. Twenty two passengers died and twenty one were injured as a result of this accident.

This matter proceeded to a thirteen day bench trial on liability over a two month period against the State of Louisiana, through the Department of Transportation and Development ("DOTD") on theories of strict liability and negligence for defective design, condition, and maintenance of the guardrail.[1]

Eleven wooden posts that supported the guardrail were damaged when struck by the bus. Plaintiffs introduced evidence that some of the posts were infested with termites. They contend

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1 The parties agreed to separate trials on the issues of liability and damages pursuant to La. C.C.P. Art 156A. Plaintiffs entered into a settlement agreement with other defendants in suit filed in United States District Court for the Eastern District of Louisiana.

DOTD failed to properly maintain and repair the posts which substantially contributed to this accident. However, the Court finds the evidence failed to show by a preponderance that the termites caused the posts to break.

The factual testimony from two eyewitnesses to this accident, Margaret and Joseph Messore, establish that the Custom bus was traveling east on I-610. The Messores estimated the bus speed at 50 to 60 miles per hour as it crossed the travel lanes of I-610 into the guardrail. Mrs. Messore testified after the bus went through the guardrail it swiped along side a portion of it for a few seconds creating sparks before it launched in the air and landed on the opposite embankment.

Sergeant Edwin Ducote supervised the investigation of the accident for the New Orleans Police Department. He testified the tire marks from the bus confirmed the bus left the roadway through the guardrail, over the golfers' path and landed on the other side. Sergeant Ducote added the path of the bus and distance traveled is consistent with a bus speed of fifty to sixty miles per hour.

Ric Robinette, plaintiffs' accident reconstructionist, testified to a bus speed of fifty to sixty miles per hour, but added it could have been as low as forty miles per hour when it launched over the golf cart path. According to Mr. Robinette, it was difficult to say what caused the bus to launch in the air, but tire marks indicated the bus first left the roadway on its passenger side. As the bus went through the

guardrail, it dragged a portion of the railing with it before it launched over the golf cart path and collided with the eastern side of the embankment. Mr. Robinette stated the golf cart path was slightly less than ten feet below the highway.

The State's accident reconstructionist, Brian McHenry, testified the bus was traveling approximately seventy miles an hour as it left the highway and launched over the golf cart path. His opinion was based on an analysis of factors including where the bus left the roadway, its initial point of launch, and final resting place as well as the length of the bus. It was Mr. McHenry's opinion that the bus was 45.5 feet long.

However, Ric Robinette testified the length of the bus was shortened at its final point of rest because of its collision with the east side of the embankment. According the Mr. Robinette, it is impossible to know the exact length of the bus immediately following impact because it may have been shortened six feet or more. There is no evidence of any measurements taken at that time. Thus, the Court finds Mr. McHenry failed to properly calculate the length of the bus and discredits his opinion because it is not supported by sound methodology and is outweighed by other factual and expert testimony.

The I-610 at the location of the accident was originally constructed by DOTD in 1971 and underwent major reconstruction in 1989. In 1987 and 1988, the design phase included a breakaway guardrail system that was intended to redirect a

4500 pound vehicle. The Custom bus with passengers weighted in excess of 35,000 pounds.

Arthur Barrow, plaintiffs' expert highway design engineer, testified the guardrail was underdesigned for the area it was intended to protect. According to Mr. Barrow, if the guardrail system had a higher level of crash worthiness, there is a good chance this accident would have never occurred. A guardrail designed with a higher crashworthy rating would have redirected the bus and it would not have penetrated the guardrail and impacted the far side embankment given its speed as testified to by Ric Robinette. It is Mr. Barrow's opinion that a guardrail with a higher crashworthy rating would have protected the driver and passengers on the Custom bus from the type of accident that occurred.

La. R.S. 48:35A(1) requires DOTD to adopt minimum safety standards regarding highway design, construction, and maintenance conforming to the standards approved by the American Association of State Highways and Transportation Officials (AASHTO) whenever possible. *Dill v. State, DOTD,* 545 So.2d 994, 996 (La. 1989). These design standards are known as the Roadside Design Guide.

The 1989 Roadside Design Guide was in effect at the time of construction of the guardrail on the I-610 where the accident occurred. (Defendant's Exhibit 1). DOTD argues the 1989 Roadside Design Guide did not have objective criteria requiring the use of a stronger guardrail system.

Richard Robertson, defendant's expert in traffic engineering and roadway and guardrail design, testified the 1989 Roadside Design Guide provided considerations for guardrail systems capable of redirecting vehicles weighing as much as 80,000 pounds but only required a guardrail designed for a 4,500 pound vehicle. According to Mr. Robertson, the State met the minimum AASHTO standards for guardrails.

Design standards at the time of original construction and at the time of the accident may be relevant factors in deciding liability of DOTD, but are not determinative of the issue of a hazardous defect. DOTD cannot escape liability by simply showing that a highway met the existing standards when built. *Dill*, id. at 996.

The Court in *Rosen v. State of Louisiana,* 809 So.2d 498, 201-0499 (La. App. 4 Cir. 1/30/02) articulated the duty of the Department of Transportation and Development (DOTD) to maintain its highways:

> DOTD has a legal duty to maintain the highways in a reasonably safe condition, *Sinitiere v. Lavergne*, 391 So.2d 821, 824 (La. 1980). The duty "extends to the protection of those people who may be forceably placed in danger by an unreasonably dangerous condition." *Id*, at 825. It extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding the speed limit or momentarily inattentive. *Trahan v.*

State, Department of Transportation & Development, 536 So.2d 1269, 1273 (La.App. 3 Dir. 1988), *writ denied*, 541 So.2d 854 (La. 1989). DOTD cannot knowingly allow a condition to exist that is a hazard to a reasonably prudent driver. In such a case, DOTD must take reasonable measures to eliminate or reduce the risks associated with the dangerous condition or may post adequate signs to warn the public of the danger, risk, or hazard involved. *Id.* At 1273.

Whether the roadway at the scene of an accident is in an unreasonably dangerous condition depends upon the facts and circumstances of each case. *Hunter v. Department of Transportation and Development*, 620 So.2d 1149, 1151 (La. 1993). DOTD cannot escape liability by simply showing that the highway met the existing standards when it was built. *Audoin v. State, Department of Transportation and Development*, 97-1938, 97-1967, p. 6-8 (La. 4/24/98), 712 So.2d 62, 66-67. Design standards both at the time of original construction and at the time of the accident may be relevant factors in determining whether a

> given stretch of roadway presents an unreasonable risk of harm, but are not determinative of the issue. *Dill v. State, Department of Transportation and Development*, 545 So.2d 994, 996 (La. 1989). Although DOTD does not have a duty to bring old highways up to modern AASHTO standards absent a major reconstruction of that highway, as explained by the Supreme Court in *Cormier v. Comeaux*, 98-2378, p. 9 (La. 7/7/99), 748 So.2d 1123, 1129, whether DOTD has conformed to those standards is a relevant factor in determining the ultimate issue of whether the roadway is unreasonably dangerous. *Aucoin*, 97-1938, 97-1967 at p. 7, 712 So.2d at 66.

In this case, the golf cart path was an "area of concern" on the 1988 design documents (Defendant's Exhibit 78). Defendant's expert, Mr. Robertson, admitted it was due to a perceived need a decision was made to keep the golf cart path. He categorized the area as a nontransversable hazard to all vehicles which had the potential to cause severe injury if impacted. Mr. Robertson also admitted it was foreseeable that vehicles would run off the road at that location and the purpose of a guardrail is to redirect vehicles and prevent impact with

obstacles.

Mr. Barrow testified that Section 1, 3, and 5 of the 1998 Roadside Design Guide list criteria for subjective consideration by a state's highway design engineer that recommend a stronger guardrail for a nontransversable hazard.

Chapter 5 of the 1989 Roadside Design Guide addresses guardrails. Section 5.3 entitled "Performance Level Selection Procedures" states in part:

> ...However, it has long been understood that barriers designed for cars should not be expected to perform equally well for larger vehicles, such as buses and trucks. Recognizing this fact, several highway agencies have developed and used barrier systems capable of redirecting vehicles as heavy as 80,000 pound tractor trailer combination trucks. Although objective warrants for the use of higher performance traffic barriers do not presently exist, subjective factors most often considered for new construction or safety upgrading include:
>
> • high percentage of heavy vehicles in traffic stream
>
> • adverse geometrics such as sharp curvature oftentimes combines with poor sight distance.
>
> • severe consequences associated with penetration of a

barrier by a large vehicle.

Thus, based on the evidence presented the Court finds DOTD knew or should have recognized the risk of serious harm associated with the installation of a guardrail system designed only to redirect cars along the I-610 where this accident occurred. The 1989 Roadside Design Guide clearly advised state highway agencies to consider the risk of harm if large vehicles penetrated a guardrail, especially in an area where a nontransversable hazard exists. DOTD's negligent conduct created an unreasonable risk of harm, not only for motorists, but also to those using the golfcart path below the highway.

Dr. Frank Griffith, an expert physicist called by the defendant, testified that at a speed of 60 miles per hour the bus could have stopped at the top of the vertical slope of the highway. However, "the failure of (the driver) to maintain control of the vehicle does not relieve DOTD of its duty to keep the highways safe". *Campbell v. Louisiana Dept. of Transp. and Development*, 94-1052 (La. 1/17/95), 648 So.2d 898, 903. The evidence supports a finding that the inadequate guardrail located where the Custom bus left the highway played a physical role in causing this accident.

The Court finds that while Frank Bedell's negligence caused the bus to leave the highway, the injuries to the plaintiffs were a direct result of impact with the launching of the bus and striking the far side embankment. (Plaintiffs'

Exhibit 1).

Therefore, the Court apportions fault equally between Frank Bedell as operator of the Custom Bus and defendant, State of Louisiana, Department of Transportation and Development.